

III

International Legal Dynamics and the Design of Feasible Missions: The Case of Afghanistan

W. Michael Reisman*

I

Military missions must be accomplished within a political and legal environment. One often indistinct and elusive but nonetheless important dimension of that environment is comprised of the expectations held by politically relevant actors (some of whom may be far from the actual arena of operation) as to what constitutes or will constitute, in the circumstances, lawful action. Expectations which approve or disapprove a projected mission can be significant factors in determining the quantum of resources required for mission accomplishment or, indeed, in determining whether there will be a successful outcome. In some cases, these considerations may require adjustments in the mission's design or even its abandonment.

It is a truism that it is wise to consult your lawyers *before* you act, for they are expert in identifying authoritative expectations. In international law, such consultations do not always help, because expectations with respect to the lawfulness of current or projected actions in the contemporary international political system are not necessarily congruent with the stuff with which lawyers ordinarily work, the formal

* Myres S. McDougal Professor of International Law, Yale Law School.

texts of international law. For one thing, the jurymen of international law, the cast of politically relevant actors, have expanded from a small group of nation-State elites who produce those texts.¹ It now includes a wide range of non-governmental actors, whose activities and influence are amplified by easy mobility and a global network of communications. For another, the texts of international law which are produced by nation-State elites vary in their effectiveness and the extent to which they reflect or shape expectations; some of the texts, for all their legalistic language, are only aspirational, while others are “law-in-the-books” rather than “law-in-action.” Still other texts are part of the “myth system” of international law rather than its “operational code.”²

So although formal international legal texts can always be “crunched” in various logical exercises to reach desired “legal” conclusions, those conclusions may prove to be quite different from the expectations of lawfulness held by the actors whose expectations of lawfulness are actually relevant for a particular mission. Thus, the international legal specialist who plays a role in the design of a military mission and who appreciates the relevance of the legal variable as a factor in the mission faces two daunting professional challenges: first, in identifying who are the politically relevant actors in a specific context, and, second, in articulating and analyzing their operative expectations of lawfulness. The key values held by important actors in the institutions of, and outside of, contemporary international law can be critical factors in the cost or feasibility of a particular military mission. In designing or appraising missions against Al Qaeda, the collective views of the UN Security Council, other governments and non-State entities form parts of the legal environment. Al Qaeda’s agents and franchisees often operate across political boundaries and may be independent of or have only shadowy relations with governments or components within them, instead deriving their support from non-governmental entities.

I believe that Afghanistan, the central focus of this workshop, provides an instructive example of my thesis. Because my purpose is to illustrate the relations between mission design and international legal and institutional environments, a cursory review of the modern history of Afghanistan is necessary.

II

Afghanistan is divided along geographic and ethnic lines which do not configure its political borders. Neither its demographic divisions nor its topography dispose it to effective and centralized control or internal stability. Still Afghanistan enjoyed an extended period of stability in the reign of Zahir Shah, from 1933 to 1973. That tranquility ended when Zahir Shah was overthrown by his brother-in-law, who

terminated the monarchy and established a republic with, *mirabile dictu*, himself as its President. Five years later, he, in turn, was overthrown by the People's Democratic Party (PDPA). Nur Mohammed Taraki became President, the republic was rechristened the Democratic Republic of Afghanistan, and closer relations with the Soviet Union were forged. The Soviet Army intervened in Afghanistan in 1979 and installed Babrak Karmal in place of Taraki. In terms of internal order, it was more on the order of a personnel change than a regime change, as the political vocabulary and secular governmental program of Karmal's predecessor continued.

President Carter had begun to fund and train Mujahidin through Pakistan's secret service, the ISI (Inter-Services Intelligence agency), to fight the Soviet-backed government.³ The policy was continued under President Reagan. The Mujahidin were a largely religiously-inspired resistance. That said and without minimizing the mobilizing potential of Jihadist Islam, any attempt to depict or comprehend the war or Afghan politics, in general, in exclusively ideological, nationalistic or religious terms without accounting for ethnicity, language, region, the pursuit of wealth or simple bare-knuckle power politics would oversimplify a dauntingly complex political system.

The Soviet occupation and the Afghan resistance cost the lives of over one million and perhaps as many as two million Afghans; five million Afghans fled the country.⁴ When the Soviet Union withdrew from Afghanistan in 1989, the subtraction of the Soviet military from the Afghan equation did not produce the immediate collapse of the Najibullah government. The civil war continued. The factor that ultimately brought Dr. Najibullah down appears to have been the Soviet decision in 1992 to terminate the sale of petroleum to the Afghan government.

Even after the collapse of the Najibullah government, the civil war ground on, with great loss of life; by then, much of the fighting was being carried on between various Mujahidin factions, who broke along language, ethnic and regional lines. Beginning in 1994, however, the Taliban, a fundamentalist Sunni and Pashtun force based in the south, emerged as a more unified element. The Taliban seized Kandahar and then Kabul in 1996 and by 2000 had captured 95 percent of the country.⁵ The erstwhile Democratic Republic of Afghanistan morphed into the Islamic Emirate of Afghanistan.

Only Pakistan, Saudi Arabia and the United Arab Emirates recognized and maintained diplomatic relations with the Taliban as the legitimate government. Nor did the Taliban fare better at the United Nations, where the General Assembly's Credentials Committee refused to seat the Taliban government, despite its effective control of the country. Instead, the Committee accredited the representatives of the ousted government of President Rabbani, the leader of a Mujahidin faction, who was not renowned for his commitment to secular values or to democracy.

There is no indication that withholding certification at the United Nations had any effect on the Taliban's control of the country. Indeed, it was only in its 2001 report *after* "Operation Enduring Freedom"⁶ that the Credentials Committee took note of the agreement on provisional arrangements in Afghanistan which the Security Council had endorsed in Resolution 1383 (2001).⁷ Thereupon, the Karzai government assumed the Afghan seat in the Assembly. Notwithstanding the potential fallacy of *post hoc ergo propter hoc*, it seems safe to say that the General Assembly's Credentials Committee was endorsing the regime change of Operation Enduring Freedom.

Osama bin Laden's organization, Al Qaeda, had been born and nurtured on the borders of Afghanistan during the war against the Soviet Union's occupation, but Al Qaeda is not a political movement indigenous to Afghanistan. It was formed as part of a pan-Islamic military effort to force the Soviet Union from Afghanistan. After the victory in 1989, Al Qaeda expanded its goals and relocated to Sudan. When Al Qaeda was subsequently expelled from Sudan as a result of US pressure, Osama bin Laden returned to and began to operate from Afghanistan. He established training and operational bases and his operatives conducted significant actions, *inter alia*, against US installations and forces. Those latter actions appear to have been the principal reason why the Security Council began taking a renewed interest in Afghanistan. Let me turn to them briefly.

In the late 1990s, though the General Assembly had refused to seat the Taliban government, Secretary-General Kofi Annan appointed a special representative who was charged with negotiating a political settlement. Meanwhile, the Security Council sought to influence events in the Afghan civil war through various resolutions which reflected different concerns. Security Council Resolution 1214 of December 8, 1998, for example, condemned many of the human rights violations of the Taliban but the Council registered, in particular, that it was "*deeply disturbed* by the continuing use of Afghan territory, especially areas controlled by the Taliban, for the sheltering and training of terrorists and the planning of terrorist acts."⁸ In paragraph 13, the Council demanded "that the Taliban stop providing sanctuary and training for international terrorists and their organizations and that all Afghan factions cooperate with efforts to bring indicted terrorists to justice."⁹

A year later, the Council's focus on Al Qaeda became sharper. It

deplor[ed] the fact that the Taliban continues to provide safe haven to Usama bin Laden and to allow him and others associated with him to operate a network of terrorist training camps from Taliban-controlled territory and to use Afghanistan as a base from which to sponsor international terrorist operations.¹⁰

In 2000, the Council reiterated this language and continued by “*strongly condemning* the continuing use of [Afghan territory, especially areas controlled by the Taliban], for the sheltering and training of terrorists and planning of terrorist acts”¹¹ The Council determined that the failure of the Taliban to respond to the demands of paragraph 13 of Resolution 1214 and of paragraph 2 of Resolution 1267 of the preceding years now “constitute[d] a threat to international peace and security.”¹² Acting explicitly under Chapter VII, the Council essentially reiterated the demands which had been made in previous resolutions but also demanded that Osama bin Laden be surrendered either to the United States or to a country that would turn him over to the United States. The Council also imposed an array of economic sanctions in Resolution 1267, denying air access and freezing funds. A year later, in Resolution 1333 (2000), the Council reiterated its demands. At the end of July 2001, the Council ordered the Secretary-General to establish a monitoring mechanism for the implementation of all of the previous resolutions.¹³

Together, these were the measures which the Security Council members were able to agree to take during that period. None prescribed by its sequence of resolutions appears to have had any effect on the Taliban’s control and administration of Afghanistan or Al Qaeda’s freedom of operation within or beyond its borders. Quite the contrary: only forty-three days after the last Council resolution, on September 11, 2001, Al Qaeda mounted its infamous attacks on civilian and military targets in the United States.

The reaction of the Security Council on September 12, in Resolution 1368, is interesting and worth quoting in full, for its content tells much about the decision dynamics of the Council, its capacity to respond effectively to such crises and, as a result, its potential to facilitate—and restrain—such military actions as the United States concluded were necessary for its defense. Resolution 1368 provides, in its entirety:

The Security Council,

Reaffirming the principles and purposes of the Charter of the United Nations,

Determined to combat by all means threats to international peace and security caused by terrorist acts,

Recognizing the inherent right of individual or collective self-defence in accordance with the Charter,

1. *Unequivocally condemns* in the strongest terms the horrifying terrorist attacks which took place on 11 September 2001 in New York, Washington, D.C. and

International Legal Dynamics and the Design of Feasible Missions

Pennsylvania and *regards* such acts, like any act of international terrorism, as a threat to international peace and security;

2. *Expresses* its deepest sympathy and condolences to the victims and their families and to the people and Government of the United States of America;

3. *Calls* on all States to work together urgently to bring to justice the perpetrators, organizers and sponsors of these terrorist attacks and *stresses* that those responsible for aiding, supporting or harbouring the perpetrators, organizers and sponsors of these acts will be held accountable;

4. *Calls also* on the international community to redouble their efforts to prevent and suppress terrorist acts including by increased cooperation and full implementation of the relevant international anti-terrorist conventions and Security Council resolutions, in particular resolution 1269 (1999) of 19 October 1999;

5. *Expresses* its readiness to take all necessary steps to respond to the terrorist attacks of 11 September 2001, and to combat all forms of terrorism, in accordance with its responsibilities under the Charter of the United Nations;

6. *Decides* to remain seized of the matter.¹⁴

You will note that the “combat by all means” statement in the second considerandum and the “all necessary steps” in operative paragraph 5 refer to the Security Council and not to any single State; the single State (obviously the United States) is confined, in the third considerandum, to self-defense. But by characterizing, in the second considerandum, terrorist acts as “threats to the peace” rather than “breaches of the peace” or “acts of aggression,” the Resolution kept them from falling under Article 51’s right of self-defense.¹⁵ As for the operative paragraphs of the Resolution, the third calls for judicial action, while the fourth refers back to the various economic and other means adopted in the previous resolutions. But their lack of success was painfully manifest in the ruins still smoking thirty blocks south of Turtle Bay.

On September 28, 2001, the Council revisited the problem in a somewhat calmer environment. Resolution 1373 (2001), again explicitly invoking Chapter VII, reiterated the pre-9/11 judicial and economic strategies but added that “all States shall . . . [t]ake the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other States by exchange of information.”¹⁶ By November 14, 2001, Resolution 1378 could refer, if vaguely, to the Council’s support for “international efforts to root out terrorism,”¹⁷ but it immediately made clear, as it

had earlier, that this was to be done “in keeping with the Charter of the United Nations.”¹⁸ Those words are code for the Charter’s prohibition on the unilateral use of force in any circumstance other than exigent self-defense. But in this Resolution, the Council inserted, in its fourth considerandum, an explicit condemnation of

the Taliban for allowing Afghanistan to be used as a base for the export of terrorism by the Al-Qaida network and other terrorist groups and for providing safe haven to Usama Bin Laden, Al-Qaida and others associated with them, and in this context [the Council] *support[s] the efforts of the Afghan people to replace the Taliban regime.*¹⁹

This was the first mention of an internationally approved regime change in Afghanistan. But it would be more than overstatement to call this an *a priori* authorization or an authentic UN initiative. By the time the Resolution was agreed, US Special Forces were operating in northern Afghanistan, actively assisting the Northern Alliance, and they would shortly be in Kabul, where a new government would be installed. As for the Taliban, they would withdraw from the capital and the other cities. They were no longer the *de facto* government of Afghanistan but were far from defeated as a military force. So the Council was, in effect, only confirming and acceding to (or participating in the fruits of) a *fait accompli* which had been accomplished without prior Council authorization.

In Bonn, Germany, a conference, which brought together non-Taliban Afghans as well as warlords who had formerly been associated with the Taliban, was convened, essentially by the United States. On December 5, 2001, the conference concluded the Bonn Agreement, which put in place provisional arrangements for a new government.²⁰ A day later, on December 6, the Security Council, in Resolution 1383, endorsed the Bonn Agreement, called on all Afghan groups to support the new government and declared itself willing to support it.²¹ On December 20, the Council, again, accommodated to rather than shaped events. In Resolution 1386, in effect, it acceded to the Bonn Agreement’s request that the Council authorize an International Security Assistance Force, or ISAF; took note of the United Kingdom’s willingness to organize and lead ISAF; and authorized ISAF to perform its mission in Afghanistan for 6 months.²² It has been renewed semiannually.

III

The purpose of this rapid diachronic review of the actions of the Security Council from the late 1990s to the end of 2001 is not to belittle the contribution of the Security Council or of the United Nations to the US response to the attacks by Al Qaeda. Quite the contrary! I believe that the United Nations is an important institution for

its member States and, when correctly and sensibly used, can be a critical instrument of policy for the United States.²³ But the United Nations is not a supple, multipurpose instrument that can be readily applied to all situations. The principles which the organization and its members value most—in particular national sovereignty, non-intervention and territorial inviolability—and the idiosyncratic structure of the Security Council limit the organization's effectiveness in managing and resolving conflicts with aggressive global Salafism. Or, to formulate it in more positive terms, the way a military mission is designed may influence whether the Security Council or, more generally, the United Nations will facilitate or constrain it; it may also determine the degree of that facilitation or obstruction.

Prior to 2001, the efforts of national actors who were threatened or were victims of Al Qaeda to work through the United Nations were of little effect. The problem was not that the Council's operational arsenal of diplomatic, economic and ideological instruments—which, after 1999, were even taken under its plenary Chapter VII powers—are inherently ineffective. In some cases, that arsenal has proved effective, either as a primary or adjunct instrument for securing desired political changes. The anti-Taliban sanctions *might* have worked over a very long period of time, especially if some of the governments contiguous to Afghanistan had fully complied with and implemented them.

The difficulty lies in that time factor. In the twenty-first century, governments, which anticipate the types of military attacks which actors such as Al Qaeda mount, cannot always afford the luxury of waiting for a very long period of time for Security Council measures to “bite.” The most noxious of Salafist threats can operate on a much more accelerated timetable and with a greater potential for destructive impacts.

This is, of course, what happened in the case of the Taliban and Al Qaeda. While the Council fine-tuned and patiently waited for its sanctions program to work, the Taliban government, amply supplied with illicit drug money and benefitting from either indifferent or actively sympathetic elements in some contiguous States, reinforced its control over Afghanistan; as for Al Qaeda, comfortably cocooned in the Taliban system, it pursued its various programs, culminating in its operations on September 11.

The United Nations is neither world politics nor even its major arena; it is a part of it, a composite actor within it. Assessing the effectiveness of the UN role in this phase of the Afghan war requires us to look at the broader arena of world politics. There, what appears to have happened is that after September 11, the United States and those States cooperating with it, perforce, took their own initiatives. As for the other less supportive but indispensable members of the Security Council, they accommodated themselves to what appeared to be a *fait accompli*, trading a

measure of Council authorization, by retrospective stamp of approval, in return for the validation of the Council's own relevance and a nominal share of supervision. In the coin of international political exchange, that validation was worth something.

But the Security Council does not control the market on international authority. It may not always deny lawfulness to an action by withholding its seal of approval; conversely, its seal of approval does not always assure that the actions in question will be viewed as lawful by other politically relevant actors in the international system. This is especially the case when the action involves invading and displacing an existing government—hence the tepid Security Council efforts prior to 9/11 and the limited authorizations (usually coming after the fact) thereafter.

IV

One of the lessons for the future here appears to be that where urgent action against entities like Al Qaeda and its affiliates is required, the responses which may, at the most, be expected from the Security Council—the sorts of measures ordered by the Council in the period before September 11, 2001—will not be sufficient in real time; in these circumstances, unilateral and, by its nature, anticipatory military action may be the only meaningful option. A confirmation of the international lawfulness of such unilateral action by the Security Council and the more diffuse international processes of decision should be sought. But it is not likely that such action, even when plausibly construed as a form of self-defense, will be authorized in advance by the Security Council or confirmed or celebrated after the fact. It appears clear, however, that the more ambitious, extensive and anti-governmental the unilateral action undertaken, the less likely will be Security Council or more general international support.

For the reasons set out in Part I, one of the considerations in the design of a unilateral action which a State feels it must take in either reactive or anticipatory self-defense²⁴ should be to increase its international legal acceptability and to decrease perceptions of the violation of international law. I would suggest that this be done even if addressing these considerations means ultimately that a less efficacious military action will be mounted. Missions which are designed so that they can be accomplished rather quickly, if unlikely to win formal and informal international approval, are more likely to provoke less, and less intense, international disapproval. By contrast, longer-term missions and, as I will explain in a moment, occupations will require international authorization and even if it does not erode, it may not be an assurance of success.

Thus, consideration of the legal perspective I sketched a moment ago leads to a general recommendation: where possible, narrow the focus of the mission to the neutralization or degrading of the specific terrorist threat and not to a regime change of the government which has served as the cocoon of the terrorist group.

V

Unquestionably, transforming a regime which is providing refuge and a launching pad for a terrorist group into a regime “enduring freedom” is a more comprehensive solution than simply degrading the capacities of the terrorist group itself. But aside from the formidable operational difficulties in effecting a regime change, which I have considered elsewhere,²⁵ planners cannot ignore the intense international political and legal resistance which a military mission of this sort will provoke.

A military action against a specific noxious target within a State is a finite and temporally limited military rather than an extended counterinsurgency action; with all the controversy it may excite (and I will consider it in a moment), it will still be less internationally controversial than an action to change the entire regime within the State.²⁶ If the jurisprudence of the International Court is taken as a reliable indicator of what formal international law currently considers lawful self-defense, the law of self-defense appears to be limited to response to and neutralization of an *immediate* threat,²⁷ and even within those narrow parameters, international appraisals of lawfulness may vary.

Contrast, first, the international legal reactions to the Clinton administration’s periodic aerial actions against Iraqi air defenses with the objective confined to “degrading” them; and, second, the international legal reaction to the US invasion of Iraq in order to change the regime. Or, to take a rather wild hypothetical scenario, imagine the contrasting reactions to (i) unilateral ISAF or Afghan military action against Al Qaeda or Taliban bases in the frontier areas of Pakistan and (ii) unilateral ISAF military action to change the Pakistani government because elements high in the government or in ISI were believed to be supporting the Taliban or Al Qaeda.

Afghanistan, I concede, presented a difficult case for military planners. In 2001, Al Qaeda was effectively integrated in the Ministry of Defense of the Taliban government. But I am not sure that even this overlap required conflating the Taliban and Al Qaeda or that it precluded the United States from characterizing the adversary as Al Qaeda, reserving for the Taliban government the status of an obstacle to reaching the actual enemy, rather than an indistinguishable part of the enemy. Once Al Qaeda and the Taliban were conflated, however, and Afghan regime

change became an ineluctable part of the mission, it was no longer possible to concentrate efforts on Al Qaeda; significant resources had to be diverted from the neutralization of Al Qaeda to creating and shoring up another Afghan government and then protecting it from the Taliban. In that difficult process, military planners had to accommodate the full range of civil, political and human rights standards of contemporary international law, which are demanded with ever greater intensity through myriad governmental and non-governmental channels. Regime change is perforce a comprehensive program and brings into the decision process a wide range of non-governmental organizations, insisting on objectives which, however worthy, detract from the prosecution of a more-focused military action; the more-focused military action would bring in far fewer and more-focused demands.

VI

A brief digression: Perhaps a more realistic understanding of how daunting a mission regime change is, especially in Afghanistan, might have led to a more focused military objective. A contemporary essay on Afghanistan appearing in the most popular online encyclopedia states:

Once in power, the [People's Democratic Party of Afghanistan] moved to permit freedom of religion and carried out an ambitious land reform, waiving farmers' debts countrywide. They also made a number of statements on women's rights and introduced women to political life. A prominent example was Anahita Ratebzad . . . who wrote the famous *New Kabul Times* editorial which declared: "Privileges which women, by right, must have are equal education, job security, health services, and free time to rear a healthy generation for building the future of the country . . . educating and enlightening women is now the subject of close government attention."²⁸

Incidentally, the online essay is not referring to the contemporary government of President Hamid Karzai but rather to the regime of Taraki, Amin, and Najibullah of the PDPA, the government which was then supported by the Soviet Union.

The essay from which I was reading a moment ago continues:

The majority of people in the cities including Kabul either welcomed or were ambivalent to these policies. However, the secular nature of the government made it unpopular with religiously conservative Afghans in the villages and the countryside, who favoured traditionalist "Islamic" restrictions on women's rights and in daily life.²⁹

Does it sound familiar?

Ronald Neumann, formerly the US ambassador in Kabul, reported that a recent poll taken in Afghanistan indicated that 55 percent of the respondents wanted the United States to remain.³⁰ That figure would be decisive in a normal civil situation where votes decide. But in a belligerent situation, it is raw power that decides. And if I may hazard an opinion, I would suggest that the balance of power in Afghanistan tilts in favor of the conservatizing and not the secularizing elements. Moreover, the relevant elite of the critical contiguous State most disposed to invest resources in trying to influence developments in Afghanistan also appears to tilt toward the conservatizing elements.

The would-be regime changer should bear in mind that, once such a mission is embarked upon, if military efforts prove indeterminative at acceptable cost levels, political solutions will have to be sought. In Afghanistan, a political solution would have to involve the Taliban. At a minimum, it would have to include some role in power for the Taliban in return for their commitment neither to host nor to support Al Qaeda. This would enable the United States to concentrate its resources on Al Qaeda. That could have been the principal objective of the mission from the outset.

I have taxed you with this little excursus from the subject of international law and expectations of international lawfulness to emphasize that outside powers, if they are willing to invest very great resources, could be influential factors in the Afghan political and military drama. But even then, the outside efforts could well prove indecisive, for Afghanistan is locked in its own historical process.

VII

I have recommended, from the standpoint of international law, the virtues of a “less-is-more” approach to the design of missions when international expectations of lawfulness appear unlikely to support a broader mission. But, in contexts like Afghanistan, is “less” really likely to be more acceptable to the institutions and jurymen of international law? In the context of Afghanistan and its unique geographical factors, can unilateral actions directed against entities like Al Qaeda, nesting in another State, ever be lawful? And how can one prospectively assess what expectations of lawfulness for such an action are likely to be?

I do not intend to crunch the familiar texts on the use of force but rather to focus on operative expectations of lawfulness. I quote from an online report of the Associated Press (AP) on June 15, 2008.

Afghan President Hamid Karzai threatened Sunday to send Afghan troops across the border to fight militants in Pakistan, a forceful warning to insurgents and the Pakistani

government that his country is fed up with cross-border attacks. Karzai said that in recent fighting in Helmand province, where hundreds of US marines have been battling insurgents for the last two months, most of the fighters came from Pakistan.³¹

Of interest to us is that President Karzai indicated that he believes that what he is threatening is a form of lawful self-defense. He stated that “Afghanistan has the right to self-defense, and because militants cross over from Pakistan ‘to come and kill Afghan and kill coalition troops, it exactly gives us the right to do the same.’”³² Karzai even threatened targeted assassinations in Pakistan of Baitullah Mehsud, the Taliban leader in Pakistan, and Mullah Omar, the leader of the Taliban in Afghanistan and de facto head of State from 1996 to 2001.

Pakistan’s reaction to Karzai’s statement (and, of course, it is not the first time he has made it) was interesting. Yousuf Raza Gilani, the Pakistani Prime Minister, insisted, according to the Associated Press, on Pakistani sovereignty over its territory but said that “the Afghan-Pakistan border is too long to prevent people from crossing, ‘even if Pakistan puts its entire army along the border.’”³³ In the meanwhile, he said that Pakistan “is seeking peace deals with militants in its borders, including with Mehsud.”³⁴ This particular Pakistani initiative has concerned the United States, the AP continues, “[b]ut Pakistan insists it’s not negotiating with ‘terrorists,’ but rather with militants willing to lay down their arms.”³⁵ Baitullah Mehsud seems to see it differently. He, the AP adds, “has said he would continue to send fighters to battle US forces in Afghanistan even as he seeks peace with Pakistan.”³⁶

And, one might add, he is not puffing. The Associated Press reports that “U.S. and NATO commanders say that following the peace agreements [between the Taliban and Pakistan] this spring, attacks have risen in the eastern area of Afghanistan along the border.”³⁷

NATO’s ISAF declined to comment on Karzai’s statement but unnamed US officials were willing to weigh in, on condition of anonymity. I quote their statement:

U.S. officials have increased their warnings in recent weeks that the Afghan conflict will drag on for years unless militant safe havens in Pakistan are taken out. Military officials say counterinsurgency campaigns are extremely difficult to win when militants have safe areas where they can train, recruit and stockpile supplies.³⁸

No one who has studied counterinsurgency will contest that. The Malayan Emergency, which is the poster child of successful counterinsurgencies—and which, incidentally, required three hundred thousand British and other troops and twelve years—was conducted in a peninsula whose surrounding waters could be controlled by the British; there was no contiguous friendly or passive State to

provide safe redoubts like those available to the Taliban and Al Qaeda in the border areas of Pakistan. Moreover, the insurgents were racially distinct from the majority population. And the British public supported the mission.

In August 2007, Senator Barack Obama said, in a speech delivered in Washington: "If we have actionable intelligence about high-value terrorist targets and President Musharraf won't act, we will."³⁹ The claim of a right of "hot pursuit," even in maritime confrontations, is controversial. In the *I'm Alone* arbitration,⁴⁰ the right of pursuit was treaty-based and, hence, applied only to US and UK flag vessels. Moreover, it applied only to pursuit within one hour's sailing time of territorial waters. So the tribunal's holding, which is not distinguished by its coherence, relates to treaty interpretation rather than a pronouncement of customary international law.

Even more controversial is the claim of a right of hot pursuit across terrestrial borders. In terms of theory, the UN Charter obviates terrestrial hot pursuit, for the only unilateral action available to a State is self-defense against an armed attack; once the adversary has fled the attacked State's territory, the right of self-defense would exhaust itself. In theory, further prosecuting action that had commenced as legitimate self-defense might itself degenerate into an armed attack.

International politics and the use of the military instrument as part of it have proved to be more complicated than the simple theory of the Charter. Instances of hot pursuit of an adversary which has entered your territory as well as anticipatory interdiction of an enemy force sheltering in the contiguous territory of another State have been occurring. While the State whose territory has been invaded has almost always (there are some exceptions) issued a protest, it is harder to conclude that the international legal system, as a whole, has unequivocally condemned each of these pursuits or generally condemned all such actions in all circumstances. To take examples only from this *annus mirabilis*, consider (i) the Turkish pursuit of the Kurdistan Workers' Party in northern Iraq, (ii) the Colombian pursuit of the Revolutionary Armed Forces of Colombia in northern Ecuador and (iii) President Karzai's threat to send Afghan troops into Pakistan in pursuit of Taliban there. What was the operative judgment as to international lawfulness in these cases? What sanction was applied, if transgression there was?

Consider the paradigmatic problem of which the war in Afghanistan is a prime example: irregular non-State forces shelter in an uncontrolled area of State A from which they regularly conduct lethal raids into State B and then withdraw to the safety of State A. According to the International Court, the actions of the irregular forces are not deemed to fulfill the "armed attack" requirement of Article 51 of the Charter. Consequently, even if the Court were to expand its conception of the scope of self-defense so that it was available against non-State entities, State B may

not respond with military force. State B is confined to bringing the matter to the Security Council. Assume that State B does bring the matter to the Security Council for ten consecutive attacks and, in each instance, the Security Council issues a resolution, condemning the attacks and ordering State A to act to prevent them. The attacks continue.

At a certain point, State B *will* enter the areas of State A where the irregulars shelter and seek to kill or capture them. Will the international community, through its various decision processes, condemn and effectively sanction the action?

The international legal system can speak with great subtlety and nuance. In *Corfu Channel*,⁴¹ the International Court of Justice condemned the United Kingdom for having entered Albanian waters without the Albanian government's consent. It held that this condemnation was itself sufficient sanction and allowed the evidence which had been improperly seized to be admitted. My estimation of the situation with respect to cross-border pursuit is that there will always be a formal condemnation because of national pride and concern for the erosion of the principle of territorial integrity but there will only be meaningful and sanction-related condemnations by the international decision processes in those cases in which the cross-border action is deemed to have been unnecessary, disproportionate or in violation of the differentiation principle.

It is, of course, by the application of these criteria that the law of war has traditionally assessed the lawfulness of actions in new situations. Whether the UN Security Council or the International Criminal Court will look at it that way remains to be seen. But even a condemnation of an internationally unauthorized military action in another State which does not affect that State's territory or political independence will be less severe than a condemnation for a temporally extended and vigorously resisted regime change.

Notes

1. W. Michael Reisman, *The Democratization of Contemporary International Law-Making Processes and the Differentiation of Their Application*, in DEVELOPMENTS OF INTERNATIONAL LAW IN TREATY MAKING 15 R. Wolfrum & V. Röben eds., 2005), reprinted in 2 TRANSNATIONAL DISPUTE MANAGEMENT 3 (2005).

2. See W. Michael Reisman, *On the Causes of Uncertainty and Volatility in International Law*, in THE SHIFTING ALLOCATION OF AUTHORITY IN INTERNATIONAL LAW: CONSIDERING SOVEREIGNTY, SUPREMACY AND SUBSIDIARITY: ESSAYS IN HONOUR OF PROFESSOR RUTH LAPIDOTH 33 (Tomer Broude & Yuval Shany eds., 2008).

3. See JOHN K. COOLEY, UNHOLY WARS: AFGHANISTAN, AMERICA, AND INTERNATIONAL TERRORISM (2000).

4. *Refugees from Afghanistan: The world's largest single refugee group*, AMNESTY INTERNATIONAL, <http://www.amnesty.org/en/library/asset/ASA11/016/1999/en/dom-ASA110161999en.html>.
5. Afghanistan—Taliban Era, <http://www.globalsecurity.org/military/world/afghanistan/taliban.htm> (last visited Oct. 15, 2008).
6. Operation Enduring Freedom is the title given to the joint US-Afghan counterterrorism operations in Afghanistan from October 7, 2001 until October 6, 2005. See BENJAMIN S. LAMBETH, *AIR POWER AGAINST TERROR: AMERICA'S CONDUCT OF OPERATION ENDURING FREEDOM* (2005).
7. S.C. Res. 1383, considerandum 5, U.N. Doc. S/RES/1383 (Dec. 6, 2001).
8. S.C. Res. 1214, considerandum 13, U.N. Doc. S/RES/1214 (Dec. 8, 1998).
9. *Id.*, para. 13.
10. S.C. Res. 1267, considerandum 6, U.N. Doc. S/RES/1267 (Oct. 15, 1999).
11. S.C. Res. 1333, consideranda 10 and 7, U.N. Doc. S/RES/1333 (Dec. 19, 2000).
12. *Id.*, considerandum 14.
13. S.C. Res. 1363, para. 4, U.N. Doc. S/RES/1363 (July 30, 2001).
14. S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001).
15. U.N. Charter art. 51.
16. S.C. Res. 1373, para. 2, U.N. Doc. S/RES/1373 (Sept. 28, 2001).
17. S.C. Res. 1378, para. 1, U.N. Doc. S/RES/1378 (Nov. 14, 2001).
18. *Id.*, considerandum 2.
19. *Id.*, considerandum 4 (emphasis added).
20. Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions, Dec. 5, 2001, available at <http://www.un.org/News/dh/latest/afghan/afghan-agree.htm>.
21. S.C. Res. 1383, *supra* note 7, paras. 1–3.
22. S.C. Res. 1386, considerandum 8 & para. 1, U.N. Doc. S/RES/1386 (Dec. 20, 2001).
23. See W. Michael Reisman, *The United States and International Institutions*, 41 SURVIVAL 62 (1999).
24. See W. Michael Reisman & Andrea Armstrong, *The Past and Future of the Claim of Pre-emptive Self-Defense*, 100 AMERICAN JOURNAL OF INTERNATIONAL LAW 525 (2006).
25. W. Michael Reisman, *Why Regime Change Is (Almost Always) a Bad Idea*, 98 AMERICAN JOURNAL OF INTERNATIONAL LAW 516 (2004), also available at 2004 PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 290.
26. It may even be viewed as lawful, as I will explain below.
27. See, e.g., *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27).
28. Wikipedia, *Afghanistan*, <http://en.wikipedia.org/wiki/Afghanistan> (last visited Aug. 30, 2008).
29. *Id.*
30. ABC News/BBC World Service Poll, *Afghanistan: Where Things Stand*, Dec. 7, 2006, available at http://abcnews.go.com/images/politics/afghanistan_poll_061205.pdf.
31. Carlotta Gall, *Karzai Threatens to Send Soldiers to Pakistan*, NEW YORK TIMES, June 16, 2008, at A6.
32. *Id.*
33. *Afghan President: I'll Send Troops to Pakistan*, THE ASSOCIATED PRESS, June 15, 2008, available at <http://www.foxnews.com/story/0,2933,367184,00.html>.
34. *Id.*
35. *Id.*

- 36. *Id.*
- 37. *Id.*
- 38. *Id.*
- 39. Statement of Barack Obama, *available at* http://factcheck.barackobama.com/factcheck/2008/06/19/bin_laden_death_penalty.php.
- 40. *I'm Alone* Arbitration (U.S. v. U.K.), 3 R. Int'l Arb. Awards 1609 (1935).
- 41. *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 17 (Sept. 30, 1947).